IN THE MATTER OF THE UNIVERSITY TRIBUNAL
OF THE UNIVERSITY OF TORONTO (APPEAL DIVISION)

IN THE MATTER OF charges of academic dishonesty filed on June 27, 2013,

AND IN THE MATTER OF the University of Toronto *Code of Behaviour on Academic Matters, 1995* (the "*Code*");

AND IN THE MATTER OF the *University of Toronto Act*, 1971, S.O. 1971, c. 56 as amended S.O. 1978, c. 88

BETWEEN:

THE UNIVERSITY OF TORONTO

Appellant

and

O[redacted] K[redacted]

Respondent

REASONS FOR DECISION

Appeal hearing date: November 11, 2015

Members of the Discipline Appeal Board:

Ms. Patricia D.S. Jackson, Chair
Ms. Jenna Jacobson, Student Panel Member
Ms. Beth Martin, Student Panel Member
Professor Elizabeth Peter, Faculty Panel Member

Appearances:

Rob Centa, for the Appellant, the University of Toronto

The Appeal

1. Ms. K[redacted], (the "Student") was charged, and convicted of the following academic offences (the "unauthorized assistance offences"):

> (1) On or about March 4, 2013, you knowingly obtained unauthorized assistance in connection with a partial essay draft that you submitted for academic credit in the Course, contrary to section B(i)1(b) of the *Code*; and
>
> (2) On or about March 19, 2013, you knowingly obtained unauthorized assistance in connection with an essay that you submitted for academic credit in the Course, contrary to section B(i)1(b) of the *Code*; and

2. The Student was also convicted of other academic offences, and a sentence imposed for all of the convictions. No appeal is taken from the other charges for which there were convictions, or in respect of sentencing.

3. The Student was also charged and acquitted of the following academic offences (the "plagiarism offences"):

> (1) On or about March 4, 2013, you knowingly represented as your own an idea or expression of an idea and/or the work of another in a partial essay draft that you submitted for academic credit in the Course, contrary to section B(i)1(d) of the *Code*; and
>
> (2) On or about March 19, 2013, you knowingly represented as your own an idea or expression of an idea and/or the work of another in an essay that you submitted for academic credit in the Course, contrary to section B(i)1(d) of the *Code*.

4. The University appeals the decision of the Trial Division of the University of Toronto Tribunal to acquit the Student in respect of the plagiarism offences.

5. The University submits that the Tribunal erred in concluding that plagiarism under Section B(i)1(d) of the *Code* requires an "element of theft". The University further argues that

the "rule against multiple convictions" (often called the *Kienapple* principle) does not apply so as to prevent a conviction of plagiarism in respect of the same acts giving rise to a conviction for unauthorized assistance.

The Student did not respond or attend

6. As discussed in the Reasons for Decision of the Tribunal, the Student did not attend or participate in the Tribunal proceedings. Relying on the provisions of the *Statutory Powers Procedure Act*, and the Tribunal's *Rules of Practice and Procedure*, including the provisions that set forth the proper method of service, the Tribunal concluded that the Student had been properly served, and that it was appropriate to proceed in her absence.

7. Similarly, on this appeal, the University led evidence that the Tribunal's Reasons for Decision, the Provost's Notice of Appeal, emails detailing the arrangements for the scheduling of this appeal and the Provost's materials on the appeal were all sent to the Student's email address as contained in ROSI (the Repository of Student Information). This is an authorized method of service under the *Rules of Practice and Procedure*. As it did in the case below, the University also couriered a letter confirming the time for the appeal, and a copy of the Provost's materials for the appeal to the Student's mailing address as listed in ROSI. However, the ROSI notation indicated the termination date for that address was the end of August 2013, and, indeed, the courier was unable to deliver anything to the Student at that address. The University advised that the Student has not responded to any of the communications sent to her, or otherwise participated in these proceedings, since her meeting with the Office of Student Academic Integrity in May of 2013.

8. Given the service of all relevant documents on the Student as required under the *Rules of Practice and Procedure*, the clear notification of the University's *Policy on Official*

Correspondence with Students, including the obligations thereby imposed, and the provisions of the *Statutory Powers Procedure Act*, we consider that the Student has been provided with reasonable notice and that it was appropriate to proceed in her absence. Reasonable notice was given and no response was received.

The Decision Below

9. The issues on appeal relate to the Student's submission of a partial essay draft, and the subsequent final essay in her East Asian Studies 209H course.

10. Concerning those two documents, the Tribunal found that the evidence was clear that:

- the Student obtained the assistance of another person – namely Doug Manson;
- the writing styles manifested in both the partial draft essay and the final essay differed markedly from the writing style in the Student's in-class test;
- the "document properties" of both the partial draft essay and the final essay revealed the author to be "Doug Manson";
- when interviewed by the Dean's Designate, the Student did not know the meaning of some of the words used in in her essay and could not provide any details as to the process she followed in writing the essay; and
- there was compelling evidence that the Student admitted that Mr. Manson had helped her with the partial essay and that he had written at least half of the final essay.

11. The University does not dispute, and indeed it relies upon, these factual findings on the appeal.

12. On the basis of these findings, the Tribunal found the Student guilty of the unauthorized assistance offences. The offence of unauthorized assistance, as set out in Section B(i)1(b) of the *Code* is as follows:

> It shall be an offence for a student knowingly…to use or possess an unauthorized aid or aids or obtain unauthorized assistance in

> any academic examination or term test or in connection with any other form of academic work.

13. The University also sought a conviction for plagiarism in respect of the partial essay and final essay under Section B.I.1(d) of the *Code* which provides:

> It shall be an offence for a student knowingly…
>
> (d) to represent as one's own any idea or expression of an idea or work of another in any academic examination or term test or in connection with any other form of academic work, i.e. to commit plagiarism (for a more detailed account of plagiarism, see Appendix "A").

Appendix "A" of the *Code* referred to in the offence section as providing "a more detailed account of plagiarism" reads as follows:

> In this *Code*, unless the context otherwise requires:
>
> (p) "plagiarism" The present sense of plagiarism is contained in the original (1621) meaning in English: "the wrongful appropriation and purloining, and publication as one's own, of the ideas, or the expression of the ideas… of another." This most common, and frequently most elusive of academic infractions is normally associated with student essays. Plagiarism can, however, also threaten the integrity of studio and seminar room, laboratory and lecture hall. Plagiarism is at once a perversion of originality and a denial of the interdependence and mutuality which are the heart of scholarship itself, and hence of the academic experience. Instructors should make clear what constitutes plagiarism within a particular discipline;"

14. The Tribunal declined to convict the Student of the plagiarism offences. In coming to this conclusion, the Tribunal noted that University counsel was not aware of any other cases in which a student had been convicted both of obtaining unauthorized assistance and of plagiarism in circumstances where a student submitted the work of another person.

15. More importantly, the Tribunal noted, that Appendix "A" refers to the "purloining" of work as one's own, and hence, in the view of the Tribunal, necessarily includes the theft or misappropriation of the work of another. In other words, the Tribunal held, to convict a student

of plagiarism it was necessary to show that the Student had taken another's ideas or words without that person's permission. As there was no suggestion that the Student lacked permission from Doug Manson to use his ideas, indeed on the contrary the evidence suggested he had granted his permission, there was no basis upon which the Student be could convicted of the offence of plagiarism.

16. On the basis of the convictions for the unauthorized assistance offences, and the convictions on other offences which are not the subject of this appeal, the Tribunal accepted the University's recommendation as to the appropriate penalty, namely a 0 in the course, a suspension for five years, a notation of the penalty on the Student's transcript until graduation, and a report for publication of the decision of the Tribunal. The University did not submit below, and did not submit on this appeal, that the sentence should be increased in the event of a conviction for the plagiarism offences.

17. Having found that the evidence did not permit a conviction for plagiarism, it was not necessary and the Tribunal did not consider the question of whether if the facts established a basis for conviction of plagiarism, the rule against multiple convictions would preclude a conviction for both unauthorized assistance and plagiarism.

Issues on Appeal

18. The issues therefore raised by the appeal are:

a. whether the Tribunal erred in concluding that plagiarism under Section B(i)1(d) of the *Code* requires an element of theft; and

b. whether the rule against multiple convictions applies so as to prevent a conviction of plagiarism in respect of the same acts giving rise to a conviction for unauthorized assistance.

a. Whether Plagiarism under Section B(i)l(d) of the Code requires an element of theft

19. The offence of plagiarism is defined in s. B.I.l(d) of the *Code* noted above at paragraph 12. In the plain and ordinary meaning of the language used and incorporating the *Code*'s definition of "knowingly" the offence is established if the Student knew or ought reasonably to have known that she was representing as her own, an idea or expression of an idea or work of another person.

20. In this case, the Student submitted the ideas, expression of ideas and work of another person without attribution or any other indication that they were his. She represented those as her own. In the circumstances, the Student knew or ought reasonably to have known that she was doing so.

21. We conclude that the University has established the offence of plagiarism.

22. We disagree that the University is required to establish, in addition, that the Student was using the ideas or words of another without that person's permission, or in other words that there was an element of theft. We come to this conclusion for several reasons:

- There is no element of theft contained in the section of the *Code* that defines the offence of plagiarism, section B.I.1(d). The Tribunal's decision to import or read in an element of theft is inconsistent with the clear and unambiguous language of s.B.I.1(d). The word "purloining", on which the Tribunal's interpretation turned, does not define the plagiarism offence. It is found in Appendix A which contains "a more detailed account

of plagiarism" and there is nothing to suggest that this is intended to derogate or otherwise modify the offence defined in s. B.I.1(d) of the *Code*. Indeed, when read in context[1], we interpret "purloining" as referring to the taking of another's ideas or words without proper attribution, as the balance of the sentence indeed makes clear.

- We also agree with the University that it is appropriate to read the word "purloining" in the context of the *Code* as a whole. As the *Code* indicates in multiple places, including in the preamble, it is concerned with "the integrity of the teaching and learning relationship, openness, honesty and courtesy before any private interests" and "to ensure that academic achievement is not obscured or undermined by cheating or misrepresentation, that the evaluation process meets the highest standards of fairness and honesty and that malevolent or even mischievous disruption is not allowed to threaten the educational process". Viewed in the light of the *Code's* expressed objectives, the plagiarism offence is not designed to protect the private interests of third parties, including authors, from the unauthorized copying of their works, but rather to ensure that a student is prohibited from obtaining academic credit for someone else's work.

- The Tribunal's interpretation of the plagiarism offence is completely unworkable (and undesirable) in the academic setting. If the element of theft (or a lack of consent by the author) is required to make out the offence of plagiarism, then the University would be required in every case to prove that the author did not consent to the student's use of his or her idea, expression or work. The University cannot be expected to call the author of any article, textbook, internet page or otherwise that the student has copied without

[1] Appendix A reads: "The present sense of plagiarism is contained in the original (1621) meaning in English: "the wrongful appropriation and purloining, and publication as one's own, of the ideas, or the expressions of the ideas… of another."

> appropriate attribution to testify to the lack of consent. Nor is it appropriate that a student could successfully defend a charge of plagiarism by leading evidence that the author of an unattributed work expressly or impliedly consented to her use of the work. The consent, for example of a paid author, would not be an appropriate answer to a charge of plagiarism. It is precisely because of this fact that many of the examples of plagiarism convictions under the *Code* occur when students have paid consenting third parties to create the work on their behalf.

In the result, we conclude that it is not an element of the offence of plagiarism that the misrepresentation of work of another person as the student's own be shown to be done without the consent of that other person. On the facts of that case, the offence of plagiarism was made out.

b. Whether the Rule against Multiple Convictions prevents a conviction of Plagiarism in respect of the same acts giving rise to a conviction for Unauthorized Assistance

23. This then leads to an issue which the Tribunal, given its findings, did not address, and that is whether the rule against multiple convictions prevents a conviction for plagiarism in respect of the same acts giving rise to a conviction for unauthorized assistance. For the reasons that follow, we conclude that it does.

24. It does not appear that this issue has been previously addressed in decisions of the University Tribunal at either level.

25. The Tribunal appears to have misinterpreted the University's statement as to whether there have been previous cases of conviction for both unauthorized assistance and plagiarism for the same acts. The University referred to three cases in which a student was convicted of plagiarism and unauthorized assistance: *University of Toronto v. S[redacted]-B[redacted] P[redacted] (Case 601)*,

University of Toronto v. K[redacted] H[redacted] (Case 602), and *University of v. S[redacted] H[redacted] (Case 539)*.[2] However, each of these cases was decided on the basis of an agreed statement of fact, an agreement as to which charges would proceed and which would be withdrawn, and a guilty plea. Before the Tribunal and before the University conceded that there was no argument or consideration of whether it was appropriate to enter convictions for both prevented plagiarism and unauthorized assistance on the facts of those cases.

26. The University also noted the case of the *University of Toronto v. A[redacted] L[redacted]*[3] *(Case 410)*, in which the Tribunal dismissed multiple charges in respect of the same act, and entered a conviction in respect of one count only relating to each event of misconduct on the basis that the other charges were duplicative.[4] In effect, the Tribunal appears to have invoked the principle underlining the rule against multiple convictions without expressly considering the rule.

27. The rule against multiple convictions has developed in the criminal context, and been well established as a matter of Canadian law since at least the decision in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. The essence of the rule is that "Canadian courts have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict."[5] The principle is equally applicable in the case of non-criminal convictions, such as those in issue here.

28. The rule against multiple convictions is applicable where there is a relationship of sufficient proximity between (1) the facts and (2) the offences which form the basis of the two or more charges.

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[2] Decided on March 8, 2011, May 6, 2011 and August 11, 2009, respectively.

[3] August 20, 2007

[4] [redacted], *supra*, at para. 27

[5] *R. v. Prince*, [1986] 2 S.C.R. 480

29. The requirement for a factual nexus essentially asks whether the charges are both grounded in the same transaction or act. Here, the charges of plagiarism and unauthorized assistance clearly arise from the same act. The first charge of plagiarism and unauthorized assistance relates to the submission of a partial essay draft on March 4, 2013, and the second charge of plagiarism and unauthorized assistance relates to the submission of a final essay on March 19, 2013.

30. The requirement for a sufficient proximity between the offences which form the basis of the charge is that if there are no "additional or distinguishing elements going to guilt in the second offence for which conviction is sought which are not present in the first offence".

31. In this case, the offence for which the Student has already been convicted occurred when the Student used or possessed an unauthorized aid or aids or obtains unauthorized assistance in the writing of the partial essay and the final essay. The offence of plagiarism occurred when the Student represented as her own any idea or expression of an idea or work of another in the partial essay and the final essay.

32. Rather than creating any additional or distinguishing elements to the offence of unauthorized assistance, the offence of plagiarism on the facts of this case is in effect a particular method of obtaining unauthorized assistance. The assistance which forms the foundation for the Student's guilt under the offence of unauthorized assistance is the use of the work of another -- a partial essay in one case and a final essay in the second. The reason that the assistance is unauthorized under the *Code* is that work was represented as the work of the Student. In effect the plagiarism for which the University seeks the conviction of the Student is no more than a specification of the means by which the Student employed unauthorized assistance. It does not add any distinguishing or additional element to the offence of unauthorized assistance.

33. While not determinative, we note that the University's decision here and below not to seek any additional penalty in respect of the plagiarism offences reinforces the conclusion that they do not add anything additional to the elements of the unauthorized assistance offences.

34. In the circumstances, we are of the view that on the facts of this case, there is sufficient nexus between the offences and the facts on which they are based to engage the rule against multiple convictions.

35. In the result, we conclude that the Tribunal erred in concluding that the evidence did not establish an offence of plagiarism, but that the rule against multiple convictions prevents a conviction for both the unauthorized assistance offences and the plagiarism offences.

36. We accordingly dismiss the appeal.

February 3, 2016.

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